

1723900 (Migration) [2020] AATA 2665 (23 January 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1723900

MEMBER: Meena Sripathy

DATE: 23 January 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 23 January 2020 at 10:54am

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Partner) – genuine spousal relationship – mutually exclusive relationship – validly married – sponsor’s relationship with house sharer before marriage to applicant and while applicant offshore – two children of undetermined paternity have sponsor’s surname – father figure to children – social media posts referring to ‘wife’ and ‘children’ – house sharer’s other relationships and marriage – financial, household and social aspects of relationship – nature of commitment – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359A, 375A, 376
Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 100.221

CASES

Cao v MIAC [2007] FMCA 225
He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 September 2017 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 12 April 2012 on the basis of her relationship with her sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because the delegate was not satisfied the relationship between the applicant and sponsor was mutually exclusive to the exclusion of all others.
5. The applicant appeared before the Tribunal on 7 November 2019 to give evidence and present arguments. The applicant was represented in relation to the review by her registered migration agent.
6. The issue in the present case is whether the applicant is the spouse of the sponsoring partner at time of decision.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. *Evidence before the Department*

9. The applicant is a [age] year old Nigerian born woman. She included in her application her adult son, born in [year] (later withdrawn from the application). She was previously married to [Mr A] from 1991 to 2010, and that relationship ended when he died (indicated in the application as [January] 2010). She stated there were [number of] children of that relationship. She is [an Occupation 1]. She provides details of a mother, [number of] brothers and one son in Nigeria.
10. The applicant is sponsored by [Mr B], who is a [age] year old Liberian born Australian citizen. He is [an Occupation 2]. He has [number of] siblings, [number] of whom reside in Australia and one in Liberia.
11. The applicant first came to Australia [in] April 2010. The applicant and the sponsor met in September 2010 in Sydney and commenced a long term relationship two months later. They married [in] December 2011. The applicant departed Australia [in] March 2012 and lodged her application for a Partner visa on 12 April 2012.
12. She was granted a subclass 309 visa in August 2014 and entered Australia [in] November 2014 on that visa.

13. On 4 November 2016 she was requested to provide more information for the Partner (Migrant) Subclass 100 application. In response she provided Statutory Declarations from herself and the sponsor dated November 2016; an [Bank 1] joint bank account statement for the period 8-14 November 2016 indicating one deposit transaction of \$2,200 followed by a withdrawal the same day in the amount of \$2,100; two Form 888 Statutory Declarations from mutual friends of the parties ([Mr C] and [Mr D]); one joint energy account and a bundle of photos. Subsequently another [Bank 1] bank statement for the period September to November 2016 in the applicant's name; a letter from the applicant; and a [Bank 2] account statement for July – December 2016 in the applicant's name; various other correspondence and invitations and more photos were submitted in December 2016.
14. On 26 April 2017 the Department undertook a [social media] search relating to the applicant and sponsor, the results of which are contained on Department file [number] at folios 29-31 and are discussed further below.
15. On 2 June 2017 the applicant was interviewed by an officer of the Department by telephone. Notes of the interview are included in Department file [number] at folio 39. She provided details of her and the sponsor's current living, work and financial arrangements. She referred to sharing premises with the sponsor's brother, [Mr E] and the owner who is Liberian and known to her as [Nickname]. She stated that she has 4 children from previous relationships living overseas, the sponsor has none and they have no children together but are looking into IVF treatment. Their main social activity is church on Sunday and they were planning a trip to Nigeria in July/August 2017.
16. On 6 June 2017 the sponsor was interviewed by phone. The notes indicate that he provided the following information 'in response to [information] that he was in a relationship with another woman and shared two children of the relationship.' He said he and the applicant reside at a residence owned by [Nickname] or [Ms F], who also lives there with [Mr G] and four of [Ms F]'s children. The notes indicate [Ms F] is the sponsor for a pending 801 application for [Mr G]. The sponsor confirmed that two of the children are [Child 1] (born [Date 1]) and [Child 2] (born [Date 2]) and that [Child 1] refers to him as 'Dad' and [Mr G] as 'Daddy'. The sponsor would not say whether he was the father of these children but he acknowledged he knew [Ms F] when he lived in [Country 1] and had been intimate with her periodically between 2009 and 2014. He stated he was present at the birth of the second child and believed he was the father although she later told him he was not. He stated that he had been intimate with her around possible conception dates for the children 'but it only occurred twice and he was drunk'. He was asked why he was the contact person for [Ms F] on incoming passenger cards and he said they used to live together. He asked the officer whether this information would be disclosed to the applicant. The sponsor also confirmed during the interview that he had a [social media] page, last used the previous day, and that he was not 'friends' with the applicant on it, but denied mentioning his children on this page. He was asked whether he was married to [Ms F] and he said no.
17. On 16 June 2017 the applicant was invited to comment or respond to the adverse information provided by the sponsor at the interview, specifically relating to the sponsor's admission of having intimate relations with [Ms F] between 2009 and 2014 and residing with her and that two of her children born in 2009 and 2014 share the sponsor's family name suggesting he is their biological father. In response the applicant provided a statement stating that she was unaware of this previously and it came to her as a shock. She states that when confronted the sponsor admitted to his involvement with [Ms F] while the applicant was away and begged her forgiveness. She states that [Ms F] is married to another man and the applicant and sponsor have agreed to move away and live separately. The sponsor, in a Statutory Declaration, stated that he was and continues to be in a genuine and continuing relationship with the applicant.

18. The delegate considered this response but refused the application on 15 September 2017.

19. *Evidence before the Tribunal*

20. On 5 and 7 November 2019 the Tribunal received the following documents in support of the review:

- Statutory Declaration by the applicant dated 4 November 2019
- Statutory Declaration by the sponsor dated 4 November 2019
- [Bank 1] joint bank account statement for period 8 May 2018 to 6 September 2019
- Evidence of [a named franchise business]
- Payslips for the applicant
- Photographs of the applicant and sponsor
- Statement of [Mr C] dated 5 November 2019 – affirming earlier Form 888 provided in November 2016 and stating he continues living with the parties at [Suburb 1]. He has been living with them since July 2017 at several addresses, and observes them living their lives as a genuine married couple.
- Statement of [Ms H] dated 6 November 2019 – sister of the sponsor, attended their wedding in 2012. States her opinion that they are a genuine couple, whose relationship is ongoing. They have visited her house and she has visited theirs.
- [Electricity] bill dated 2 May 2019 addressed to applicant at [Suburb 1] address.
- More photographs of the applicant and sponsor.

21. *Hearing 7 November 2019*

22. At the hearing the applicant provided a further witness statement from [Mr D] affirming his previous Form 888 provided in November 2016 and stating his opinion about the genuine and ongoing relationship between the applicant and sponsor based on his observations of them.
23. The Tribunal informed the applicant at the commencement of the hearing that a certificate under s375A and a certificate under s376 were included in the Department file, and the effect of these, if valid, is to limit disclosure of information contained in the documents. However, the Tribunal indicated its view was that the reasons provided to support the certification were not valid. Relevant information in the folios subject to the certificates were discussed during the hearing, and in a post hearing invitation to comment.
24. A summary of the evidence provided by the applicant at the hearing follows. She confirmed her current address, where she had been living for the past two years with the sponsor and another person, named [Mr C]. Previous to this address they all lived together at an address in [Suburb 2]. [Mr C] is single, but he recently married and is waiting for his wife and family to come to Australia.

25. Prior to these addresses, she lived with the sponsor at an address in [Suburb 3]. They moved after the Department's decision, because of the issues that arose at that time. She stated that they have a lease for their current address and they are both named on the lease.
26. The applicant has three different jobs at present. She works at [Workplace 1] 4 nights a week from Wednesday to Saturday from 10.30pm to 7.15am. She does casual shifts for [two other employers] on other days. She also helps the sponsor when she is available with his [franchise business]. She sometimes works two jobs in one day and often 7 days a week. She drives to her work in her own car. The sponsor works at [Workplace 2] from 1am to 10am Monday to Friday. During the day he does work in his own [franchise business]. He does not usually work on Sunday.
27. Regarding family, the applicant has none in Australia. In Nigeria she has her mother and one younger brother. She had two other brothers but they passed away, one only several months ago from [cancer]. She has [number of] children. [Number] of them reside in [Country 2] and one is presently studying in [Country 3]. Her children are aged [age], [age], [age], [age] and [age] years old. She went to [Country 2] in 2007 with her children. At the time she was working for [a company] and was sent there for a course. She took the children and they were enrolled in schools. After 6 months she returned to Nigeria, but left the children in [Country 2] because she did not want to disrupt their education. When she returned to Nigeria, there were problems going on and her husband was killed. She returned to [Country 2] in 2008, and then returned to Nigeria in 2009. Her children stayed in [Country 2]. Her visa was not renewed after that, and she was unable to return to [Country 2]. The children remained there and were taken into foster care until the older ones reached 18. The youngest is still in foster care. She is in contact with the older children now by WhatsApp.
28. The Tribunal asked why she only mentioned one child in the application. She said he was the only one dependent on her, he returned to Nigeria and was there until recently when he went to study in [Country 3]. He was included in the present application but due to a misunderstanding by the agent his application was withdrawn prior to the visa grant.
29. The sponsor is aware that the applicant's children are in [Country 2] and that her previous husband died. He has had some contact on the phone with two of her children.
30. The Tribunal asked why she came to Australia in 2010. She said she came to visit and because she was fearful due to what happened to her husband. Eventually she applied for protection, but the application was refused, and the review was also unsuccessful.
31. The Tribunal put to her information contained in the Department file of an interview with her at the airport on her arrival is not consistent with what she has recounted. There she referred to her intention to travel to Australia with her husband and expecting him to arrive within a few days. She stated that this was not correct. The Tribunal indicated that her untruthfulness may reflect poorly on her credibility. She made no further comment.
32. The Tribunal asked about the history of the relationship. A surprise party was organised for her birthday and the applicant attended. They started talking and exchanged numbers and things developed from there. In December 2010 he proposed marriage to her and she accepted. They married [in] December 2011. Friends and some relatives of the sponsor attended the wedding. It was held at his uncle's house, her housemates came and some of his friends. None of the sponsor's siblings attended the wedding. After the wedding the applicant continued to live at the address she was living in [Suburb 4] and he remained living at his address. They would visit each other. The Tribunal asked why they did not move in together. She said she did not know whether she would be able to lodge an application here or have to depart Australia and lodge offshore. When she realised that she had to go

overseas she decided to stay where she was until she left. She departed in March 2012 and lodged her application in April 2012. During the period she was overseas they communicated by telephone. The sponsor did not visit her because they assumed she would be returning soon, although it stretched out to two years.

33. During this period the sponsor was living with [Ms F] and her 3 children and they all moved together to another address in [Suburb 5]. At some stage the sponsor told the applicant that [Ms F] had married and her new husband also lived with them. When the applicant arrived in Australia in 2014, she lived with the sponsor, [Ms F], her husband and how 4 children, as [Ms F] had a new infant child. The Tribunal asked the applicant why the sponsor stayed living with [Ms F] throughout this period. She said he told her they were friends since a long time ago and this arrangement was economical for all of them. Soon after her arrival they all moved to another address in [Suburb 3].
34. The Tribunal asked the applicant who she understood was the father of [Ms F]'s children. She said according to the sponsor, [Ms F] came from [Country 2] to Australia with two children and the father was over there. When she first met [Ms F] when she came over to visit the applicant [Ms F] had another young child. She never asked her or the sponsor who the father was because in her culture this is not appropriate. When she came back from Nigeria in 2014 and [Ms F] had a fourth child, she assumed it was her and her new husband's as he was there by this time.
35. The Tribunal asked the applicant about the financial arrangements between them. She said initially the sponsor supported her until she found work. They opened a joint account in 2015. When asked how this account is operated, she said she mainly uses it. They each have their own accounts, with [Bank 1] and also [Bank 2], into which their respective pay goes. The sponsor also has a business account for the franchise business. He gives her \$400 per week in cash. The present tenant also gives her \$330 in cash per fortnight. She transfers funds from her [Bank 1] personal account to the joint account regularly and she pays the rent, bills and other living expenses from this account. The sponsor does not have his own card for the joint account and does not transfer any money into it. His financial contribution is just the \$400 per week he gives the applicant in cash. The Tribunal asked if they have any joint assets or purchases. She said they bought some furniture when they moved to the present address, including a sofa, washing machine and fridge. They have each taken separate personal loans of about \$30,000. Her loan was taken for the purposes of funding her son's education. She pay his fees and expenses and sends around AUD\$1800 per month for this purpose. The sponsor does not contribute to the education expenses of her son. The sponsor took out a personal loan to start the [franchise] business.
36. The Tribunal asked the applicant about the household arrangements. She said they are both very busy working and there are no rigid rules about who does what. She mostly cooks and shops. They do not see each other much because of their work routines. Mostly it is for a few hours in the morning when he returns from his job and before he goes to do the [franchise business] work. Sometimes she helps him with that work if she doesn't have other shifts.
37. The Tribunal asked the applicant if, since moving out from [Suburb 3] the sponsor has seen the children [Child 1] and [Child 2]. She said to her knowledge he has not. It asked what discussions they have had about the issue of the girls and his paternity of them. The first she knew about this is when the Department raised it with her. She confronted the sponsor first and he eventually confessed and told her it was an on and off thing with [Ms F] but not a relationship. Then the applicant approached [Mr G] and [Ms F] and [Ms F] did not want to discuss it and told them both it was her personal business. She did not deny or confirm if the sponsor was the father of the children, telling them that it was none of their business. The applicant said she asked the sponsor to get a DNA test to confirm if he is the father and if so

he should take responsibility for them. She said he was willing to but [Ms F] refused. The applicant confirmed to her knowledge the sponsor has no contact with the children since they moved out.

38. The Tribunal asked about social aspects of the relationship. She said they have been too busy to have any holidays lately. The last one was last year when they went to the Gold Coast for 3 days. They travelled there with [Mr C] who lives with them. When asked if either she or the sponsor have been overseas separately she said they have not. When asked if they have been together continuously since she came to Australia in 2014, she said they have.
39. The Tribunal asked the applicant if she has declared the sponsor in her tax return as spouse. She did not know if she had. She has not named him or anyone as a beneficiary for her superannuation.
40. The Tribunal discussed with her the nature of the commitment between them. In this context it put to her the fact of the two children potentially fathered by the sponsor with another woman was relevant. In response the applicant stated that the first child, [Child 1] was born before she met the sponsor. The second child was born when she was overseas. The sponsor told her that [Ms F] never admitted to him that [Child 1] was his child. Regarding the second child, he initially told her that this occurred because she was away in Africa for too long, even though this was clearly not her fault. The Tribunal put to the applicant that it may find the sponsor's untruthfulness to her calls into question his commitment to her and asked for her comment. She said she was shocked and heartbroken when she found out about this, especially given that she was living under the same roof as that woman. It was a very difficult time for them. But ultimately it is what it is and she has come to forgive him for his indiscretions. When asked why she forgave him the applicant said she has lost one husband to death and she considers that she can forgive this one's infidelities.
41. The Tribunal put to the applicant that it has various pieces of adverse information to put to her for her comment and response. Firstly, at the interview with the Department, notes of which are included in the file, the sponsor said the child [Child 1] calls him Dad and that he was present at the birth of [Child 2] and believed he was the father at that time and that he admitted he was intimate with [Ms F] periodically between 2009 and 2014. It put to the applicant that this information may lead the Tribunal to doubt the genuineness, mutual commitment or exclusivity of the relationship. In response she said the sponsor never told her he was at the birth of [Child 2] so that is news to her. Regarding the child calling him Dad, that is not unusual for her in her cultural context as children often refer to adult men as Dad or daddy. The applicant told the Tribunal she can only believe what the sponsor tells her. The first child was born before they were a couple, and in respect of the second he told her it was a one off relations and [Ms F] has never confirmed he is the father. The applicant said she has never seen the sponsor and [Ms F] having intimate relations and she has been introduced over the years to various boyfriends of [Ms F] and then she was married to [Mr G].
42. Secondly, the Tribunal put to the applicant information in the Department file relating to [social media] searches it conducted of her and the sponsor's account. The Tribunal handed her folios 29-31 from [file number] and invited her comment on this material. In relation to the reference by her to 'hubby' she said the person she was responding to, [Mr I], is the brother of her late husband and it is cultural practice to refer to him as "hubby", and she did not mean anything else by it. The Tribunal noted that the exchange appeared more intimate than that. She denied any intimate relationship with this person. He lives in [Country 2].
43. Regarding the sponsor's [social media] account and posts, the applicant confirmed the people in the photo was the sponsor, [Child 2] and [Ms F]. She was shocked to see these

posts and had no idea he was posting this. She had no comment to make and said the sponsor will have to give his explanation.

44. Thirdly, the Tribunal put to her that information in the passenger cards of the children indicated the sponsor as emergency contact which is consistent with him being their father. The applicant made no comment on this.
45. Fourthly, the Tribunal put to the applicant that information on the sponsor's movement records indicates he was overseas from December 2016 to February 2017 and this is inconsistent with her evidence earlier that the sponsor had not been overseas since she returned and they have been together continuously since. She said she was mistaken and was in fact aware he travelled to [Country 1] for a 'container' trip – where he buys items in Australia and sends them to [Country 1] to resell. He doesn't do it often and the only other time was when she was previously in Australia she recalls he was gathering items to send in the container, and she understood he planned to go. The Tribunal noted that apart from the 2016/2017 trip, his previous travel was in 2006/2007 which was well before she was in Australia. She made no further comment.

46. *Sponsor's evidence*

47. The sponsor told the Tribunal his current address and who he lives with. He gave evidence about his work arrangements and hours, and the applicant's work and hours.
48. He gave evidence about his family composition and that of the applicant's. He knew the applicant has one living brother, two others having passed away. He knew one died last August of [cancer]. He was aware the applicant had [number of] children, [number] in [Country 2] and one in Nigeria. He named them, stating [the youngest one] was in Nigeria.
49. He gave the following account of the inception and development of the relationship. In 2010 he went to a birthday party but he didn't know at the time whose it was or that it was hers. He met the applicant there and developed an interest in her. They exchanged numbers and the relationship developed from there and he proposed to her about 8 months later and they married [in] December 2011.
50. He was living with [Ms F] and her 3 children in [Suburb 5] and there was a boyfriend [Mr J] who visited from time to time. The Tribunal asked the sponsor who is the father of [Child 1]. He said he did not know until he asked [Ms F] why [Child 1] had his family name. He said he had previously had a conversation with [Ms F] about children, telling her that because of his own background in his war torn country he did not want children of his own.
51. When the applicant returned to Nigeria in 2012 and lodged the application in April, they were calling each other regularly. He continued to live with [Ms F] and moved to another address with her and now her husband who also came to join them. When asked why he moved with them, he said he was on his own and it was a cheaper option. After that they all moved together to [Suburb 3] and [Ms F] purchased that property and he rented a room from her.
52. The Tribunal asked the sponsor about [Child 2]'s paternity. [Ms F] organised a welcome party for [Mr G] and they all got drunk. When he awoke [Ms F] was in between him and [Mr J] and he does not recall what happened during the night. Later she told him she was pregnant but she told him it was not his concern.
53. The Tribunal asked the sponsor if he has ever presented the children as his own in a public forum. He said he has not. It asked if he has ever presented [Ms F] as his wife in a public forum. He said he has not.

54. It asked him why [Child 2] has his family name. He said he believes it is because [Ms F] was thinking that if she has the same family name as [Child 1] the children would get a sibling discount at the Catholic school because that is what happened with the two older children. He said this was discussed with [Mr G] and he agreed to it.
55. The Tribunal put to the sponsor for his comment the result of the search of his [social media] account obtained by the Department. He was shown folios 29-31 from [file number] and invited to comment. In respect of the photo of him with the child and woman, he confirmed this was a photo of [Ms F] and [Child 2] and explained that he was invited by [Ms F] to join them at a party and that [Mr G] was also present and took the photo. The Tribunal put to him that it being posted on his [social media] account, with a reference to [Child 2] as "my princess" and his specific response to a question whether this was his wife, "yeah that's my wife" may lead the Tribunal to doubt the veracity of his response. He said the person who asked the question was a student of his in Africa, he does not know why he said yes it was his wife.
56. The Tribunal put to the sponsor the fact that he posted this picture and the other pictures in screenshots 7 and 8 of the children and acknowledges them as his children contradicts his evidence earlier that he has not acknowledged the children or [Ms F] publicly as his family. In response the sponsor said he made a mistake by posting these on [social media]. He said he loves the children but she won't confirm they are his and so they are not his children. With regard to the picture in screenshot 8, [Mr G] was not in the country and therefore he posted this picture because the child came home with the Father's Day card. Later the sponsor said, sometimes the children take his phone and perhaps they posted the picture, he doesn't know. The sponsor said the child called him Dad when he was the only man in the house, later she started to call him uncle.
57. The Tribunal adjourned the hearing at this point to allow the applicant and sponsor an opportunity to discuss the adverse information that had been discussed and issues arising with their representative.
58. Following the adjournment, it asked the sponsor again if he considers and presents [Child 1] and [Child 2] as his children. He said they are children and he loves them but he cannot claim them as his because their mother refuses to confirm it. The Tribunal asked if he has posted more photos of the children and/or [Ms F] on his [social media] since these were taken. He said he has not and showed the Tribunal his [social media] account on his mobile phone. The Tribunal could not see any recent posts relating to [Ms F] or the children.
59. The Tribunal asked about financial arrangements between himself and the applicant. They have a joint account and also separate accounts. He gives her \$400 per week and she uses the joint account to make all household payments and rent. He does not have a card for this account and does not use the joint account. Regarding joint assets and liabilities, they bought the business together. It cost \$60,000 including equipment, of which she contributed \$24,000 and he paid the rest. He obtained money from a personal bank loan, she had money from her own sources.
60. The Tribunal asked if he knew if she sent money to her children. She sometimes sends money but he does not know how much and or when. He does not contribute any money towards support for her children. He only contributes \$400 per week.
61. The sponsor stated he has not declared the applicant on his tax as far as he was aware. On his superannuation he nominated his sister [Ms H] as a beneficiary and has not included the applicant.

62. The Tribunal put to him that the fact of his possible paternity in respect of the two children, admission to the Department that he was present at the birth of [Child 2] and his posts on [social media] acknowledging and presenting them as his family may lead the Tribunal to doubt his commitment and exclusivity of relationship with the applicant. He stated he was not present at the birth of the child, he just visited the hospital to see her.
63. He said this is all in the past, he has since apologised to the applicant and they are now a happy couple. They both work all night and are together at home during the day, He has no time to go anywhere because he is so busy.
64. When asked if he has seen the children or [Ms F] since he moved out from [Suburb 3] he said he has not visited them. He has only coincidentally seen them at the shopping centre when they are with their sisters. He has no formal contact with them.
65. When asked if he wanted to say anything further, the sponsor said after his marriage he started to drink and this is what led to all of this behaviour.
66. The applicant was invited to respond to the sponsor's evidence in general. The Tribunal noted that it would put in writing relevant details of adverse information to provide her an opportunity to respond in writing also. She said everything that happened is in the past. The social media evidence raised today was news to her. She cannot speak for his behaviour and she can only believe what he has told her. He never told her he had posted these photos.
67. Since they moved out they are together all of the time and she is aware of all of his movements. They are committed to the future together and are working hard to save for their future. He won't make mistakes again in future.
68. On 14 November 2019 the Tribunal wrote to the applicant under s359A providing particulars of information which would, subject to her comments or response, be the reason or part of the reason for affirming the decision under review. Particulars of the information in the Department's notes of interview with the applicant and sponsor, [social media] search results obtained by the Department, sponsor's oral evidence at the hearing, departmental movement records relating to the sponsor and [Mr G] and the delegate's decision record relating to the refusal of [Mr G]'s visa application were put to the applicant for comment. She was also invited to provide information, including bank statements of all accounts held by each of them from 2014-2019, their lease agreement and other evidence of cohabitation and birth certificates for the children.
69. On 29 November 2019 the applicant's representative provided the following documents in response to the invitations:
- Sponsor's [Bank 1] bank Statements from March 2018 – November 2018
 - Sponsor's Change of Employee Details form dated 4/11/2016 citing the applicant as emergency contact.
 - Applicant's [Bank 1] bank statements
 - 6 month Residential Tenancy Agreement dated 29 January 2018 naming applicant and sponsor as tenants and stating maximum 2 adults may ordinarily live there.
 - Response to allegations from applicant – she provides comment on her cultural background, and that the reference to her as 'babe' by her brother in

law was meant as a mark of respect and had nothing to do with intimacy; in respect of the sponsor, she acknowledges the compelling evidence presented at the hearing but states that she is now confident the man she sees everyday over the past two years is a changed man, he has genuine remorse for his past behaviours and is committed to her and their marriage now.

- Birth certificates for [Child 1] and [Child 2], indicating no father named.

70. On 23 December 2019, an additional statement from the sponsor was provided. In this statement he says that he loves the applicant and they are in a mutually exclusive relationship. He acknowledges that he has not always been honest to her and has deep regrets about this. He has apologised and she has forgiven him. He is now doing everything possible to make it up to her and she is learning to trust him again. He states that [Ms F] was never his wife and they only ever had casual sex, which ended years ago. He still has doubts about whether he is the biological father of her two children, but as they lived together at the time of their birth, he played the father figure. He states that he still plays the father role when he is required to. He has no contact with [Ms F] beyond that. The sponsor states that his life and loyalty belongs to Victoria and he is fully committed to her for the rest of his life, despite his past unfaithfulness. He pleads for the Tribunal to give their marriage another chance.

71. **CONSIDERATION – FINDINGS AND REASONS**

72. **Whether the parties are in a spouse or de facto relationship at time of decision**

73. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.

74. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the requirements for a spouse relationship met?

75. On the evidence of the marriage certificate submitted with the application the Tribunal accepts the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

76. As mentioned above, the issue in the present case is whether the applicant is the spouse of the sponsoring partner at time of decision. After carefully considering all of the information

and evidence before it, including documents and information contained in the Department file, oral evidence provided by the applicant and sponsor at the hearing and documents submitted to the Tribunal, the Tribunal makes the following findings addressing the circumstances of the relationship, including those relating to the financial and social aspects and the nature of the parties' household and their commitment to each other as required by r.1.15A(3). Having considered these findings and evidence cumulatively and holistically, the Tribunal is not satisfied that the applicant and sponsor are in a spouse relationship, as that term is defined in the Act and Regulations.

77. Financial aspects of the relationship

78. The applicant and sponsor have had a joint account since 2015. However, their consistent evidence about how this account is, and has always been, used is that it is operated mainly by the applicant. Only she has a card to operate the account. Funds are transferred by her into the account from her own account and only she makes payments from the joint account. The sponsor gives her \$400 per week in cash for his share of the rent and living expenses. The applicant told the Tribunal they live with another person, named [Mr C], who contributes \$330 per fortnight towards the rent. The sponsor in his evidence confirmed that he gives the applicant \$400 per week and does not have a card for, or otherwise use, the joint account. They each have their own accounts into which their pay from employment is paid. Statements from each of these accounts were provided to the Tribunal at its request and the Tribunal has looked carefully at this evidence. It notes that the sponsor's bank statement for the account in his name shows him paying regular energy bills, despite their oral evidence that the sponsor pays the utility accounts from the joint account. His statement also shows quite a few transactions taking place in the [Suburb 3] area, after the date in which the applicant and sponsor claim to have moved.
79. The applicant and sponsor gave evidence that they have each taken out separate loans of around \$30,000. The applicant took her loan out to fund her son's education. She said the sponsor took his loan to finance his [franchise] business (purchased in his name alone). The sponsor said in his evidence that the applicant contributed to the purchase of the mowing business, but no mention of this was made by the applicant in her evidence. He confirmed that he did not and does not contribute to providing financial support for her son. Apart from the separate loans referred to above, no other evidence of liabilities, joint or otherwise, was provided. There is also no evidence of any legal obligation owned by one party in respect of the other or any evidence of joint ownership of real estate or other major assets.
80. Having considered the financial aspects of the relationship at time of decision, the Tribunal is not convinced that it strongly supports the existence of a genuine and ongoing spousal relationship. In particular, the Tribunal finds the operation of the joint account exclusively by the applicant, their separate loans and inconsistent evidence about the use of the loan funds does not support the existence of an ongoing spousal relationship.

81. Nature of the household

82. The evidence before the Tribunal is that the applicant and sponsor have lived at the same addresses since she arrived in Australia in 2014. They initially lived with [Ms F], her husband and her [children] in two different addresses, but claim they moved out from living with her after the Department's refusal decision because of the issues that arose as a result of that decision. Since then they claim to live together with a third person, named [Mr C], at two different addresses. The applicant provided the Tribunal with a copy of the Residential Tenancy Agreement for a lease from January to July 2018, naming them both as tenants. The Tribunal observes that this document indicates that a maximum of 2 adults are permitted at this address, which is not consistent with her evidence that she and the sponsor share with a third tenant. While it is possible that three adults reside at the address in breach of

the lease, the evidence also supports the possibility that the applicant lives there with the other paying tenant and not the sponsor and that his name is only included on the lease document for the purposes of this application. Together with the evidence in his bank statements of regular transactions in the [Suburb 3] area, leads the Tribunal to have doubts about whether he is living at this address or is in fact still residing in [Suburb 3] with [Ms F] and her children. Regarding other matters relating to the nature of the household, the applicant and sponsor's evidence about their respective work routines and timings mean that they hardly see each other on a daily basis. They do not for this reason appear to take meals together.

83. The applicant and sponsor have no children together for which they have joint responsibility. They both told the Tribunal that the sponsor does not contribute to the financial support of the applicant's son overseas.
84. The Tribunal has considered the evidence, obtained before the Department, that the sponsor has acknowledged having intimate relations with [Ms F] and the distinct possibility that two of her children, [Child 1] and [Child 2], may be his. In his most recent statement, dated 23 December 2019, he acknowledges that he has in the past and continues now to play a father role in their lives. While evidence was provided that the birth certificates do not record him as father, his evidence that [Ms F] refuses to confirm his paternity is directly contradicted by his 2015 [social media] posts obtained by the Department which disclose him presenting her as his wife and the children as his children. The birth certificates indicate, and sponsor has acknowledged, that both children have his surname. The Tribunal accepts that the older child was born prior to the applicant and sponsor even meeting, however the younger one was born after they married and the sponsor lived continuously with [Ms F] throughout this time. This together with the evidence of the [social media] posts and transactions on his bank account support that he is their father and is, and has always been, in a partner relationship with [Ms F].
85. The applicant told the Tribunal that the first she knew about the allegation of the sponsor's paternity in relation to the two girls was when the Department informed her. The sponsor only then disclosed what he referred to as his infidelity to her when she confronted him in this context. She said that since then they have moved out separately and to her knowledge he does not see [Ms F] or the children. The sponsor also stated this in his evidence to the Tribunal. However, when considered against all of the evidence before the Tribunal, it has serious doubts about whether the parties are being truthful.
86. In respect of the specific matters referred to in r.1.15A(3)(b) the Tribunal finds, on the evidence that the parties do not have joint responsibility for the care and support of children. In respect of their living arrangements, it accepts that they are named as joint tenants on a lease for the current address, but live there with a third person. The Tribunal has some doubts about whether the sponsor is in fact residing at this address on a full time basis, given the transactions on his bank account which place him in [Suburb 3] regularly where his children and [Ms F] live. The Tribunal is also not satisfied that the evidence supports that the applicant and sponsor share responsibility for housework. Their respective work schedules indicate little overlap between them.
87. The Tribunal is not satisfied on the evidence that the nature of the household supports the existence of a genuine and ongoing spousal relationship.
88. *Social aspects of the relationship*
89. On the basis of their oral evidence the Tribunal finds neither the applicant or sponsor have declared the other as a spouse on their tax returns. Evidence was provided that the sponsor advised his employer on a form of the applicant as his emergency contact in November

2016. His nominated beneficiary for his superannuation is his sister, and the applicant also has not nominated the sponsor as her beneficiary on her superannuation. They told the Tribunal they are too busy to take holidays, and only had one holiday together, being to the Gold Coast last year for a few days and on that occasion they travelled with [Mr C], who lives with them. The applicant had inaccurate knowledge of the sponsor's overseas trips, initially telling the Tribunal that he had never been away since they were together, and only retracting this after the Tribunal put the information to her that he had been overseas in this period.

90. The Tribunal has considered the evidence provided by the applicant of support statements from two friends, [Mr C] and [Mr D] and the statement of the sponsor's sister, [Ms H] and various photos of the parties in social settings provided to the Department and Tribunal. It acknowledges that this evidence supports that they have socialised together and have presented as a couple to friends and family and these particular friends and family members have stated their opinion of the nature of the relationship. The Tribunal gives this evidence some weight.
91. However, considering all of the evidence before it relating to social aspects of the relationship, and placing significant weight on the sponsor's past [social media] posts acknowledging [Ms F] and her two daughters as his wife and children, on balance, the Tribunal is not convinced this evidence supports the existence of a genuine spouse relationship.

92. *Nature of persons' commitment to each other*

93. The applicant and sponsor claim to have met in September 2010 at a party, the sponsor proposed marriage in December 2010 and they married in December 2011. The applicant told the Tribunal they remained living separately until she departed Australia in March 2012, with the sponsor continuing to live with [Ms F] with whom he had, by this time, a child. They commenced residing at the same address when the applicant returned to Australia in November 2014, although also with [Ms F]. Another child was born to [Ms F] and the sponsor while the applicant was away. The applicant only moved out of this household arrangement in January 2018 following the Department's decision to refuse the application in September 2017. However, even since this time, there is little evidence to show their degree of companionship and emotional support they draw from each other and how they see the relationship as long-term.
94. The Tribunal has considered the applicant's statement of 25 November 2019 in response to the s359A invitation, that she sees the applicant every day and is confident he is a changed man and committed to her and the relationship and the sponsor's oral and written evidence that, despite his past mistakes, he is now committed to the applicant and sees his future with her. However, it is not satisfied that the weight of evidence relating to the circumstances of the relationship and the Tribunal's concerns discussed above, supports these assertions.

95. *Allegations of infidelity and paternity of the two children*

96. The applicant claims she was completely unaware of the allegation that the sponsor was had intimate relations with [Ms F] after they married and that he may be the father of two of her children, until informed by the Department, upon which she confronted him and he confessed. The Tribunal has some concerns about the veracity and credibility of this claim, particularly given other evidence before it, including the [social media] posts, and evidence relating to financial, social and household arrangements between them, which taken cumulatively, call into question the commitment to the relationship by the sponsor.

97. The Tribunal acknowledges that sexual infidelity by one of the parties to the relationship does not necessarily take the relationship outside the definition of spouse or de facto. It will be a matter of fact and degree in the circumstances of the case, to be considered, along with all the other circumstances of the relationship, in determining whether the parties have or had the requisite commitment to a shared life to the exclusion of all others at the relevant time.¹
98. The Tribunal is mindful that the criteria under consideration, cl.101.221, is a time of decision requirement and has carefully considered the circumstances of the relationship at this time, having regard to the matters referred to in r.1.15A(3).
99. In the present case, the Tribunal finds that the sponsor has had a past relationship with [Ms F], including in the period since his marriage to the applicant. He acknowledges that two of her children may be his as a result of those relations, and has acknowledged that he has, and continues to, play a father figure role in those children's lives. Evidence of his [social media] posts in the past indicate that he has publically presented [Ms F] and these children as his wife and children while he was married to the applicant. After all of this was brought to the attention of the applicant by the Department, she claims that this was the first she knew of the relationship between [Ms F] and her husband and that he confessed to her about it and sought her forgiveness, and they moved to live at a separate address. However, as indicated above, evidence in the sponsor's bank statements suggest he continues to make regular financial transactions in the [Suburb 3] area, and the evidence provided relating to the applicant and sponsor's financial, household and social aspects of the relationship do not support the existence of a genuine and continuing relationship between them.
100. Therefore, on balance, having regard to all the circumstances of the relationship, including the acknowledged history between the sponsor and [Ms F] including two children of that relationship, the Tribunal is not satisfied that the applicant and sponsor have a mutual commitment to a shared life to the exclusion of all others now or that their relationship is genuine and continuing as required by s 5F(b) and (c) .
101. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision.
102. Therefore the applicant does not meet cl.100.221(2)(b).
103. There is no evidence before the Tribunal to suggest that any of the alternative criteria in cl.100.221(3) and (4) (death, family violence, child exceptions) are met.
104. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

105. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Meena Sripathy
Member

¹*Cao v MIAC* [2007] FMCA 225 (Riley FM, 21 March 2007) at [36] and [42].

106.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).